STATE'S MINING RIGHT ON OIL AND GAS INDUSTRIES OF INDONESIA

(Normative Research of Act Number 22 Year 2001 About Oil and Gas)

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STATE'S MINING RIGHT ON OIL AND GAS INDUSTRIES OF INDONESIA

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ABSTRACT

Since the Independence, Indonesia have primary economy income by Oil & Gas Mining Industries. In the development of law, Oil & Gas Mining Sector have some problem based on Act No. 22 Year 2001, for instance the state's mining right, oil & gas Mining Purpose and oil & gas mining development under the law.

In the Oil and Gas Concession countries have a position on the sovereignty of natural resources of oil and gas to the maximum benefit of the people, the law in dynamics and exploitation of oil and gas have also performed three times the testing of oil and gas law and produce interpretations Court Constitution of phrase controlled by the state that notion, controlled by the state should be interpreted to include the meaning of control by the state in a broad conception sourced and derived from the people of Indonesia's sovereignty over all sources of wealth, earth, water and the natural riches contained therein, including the therein collective sense of public ownership by the people for the resources in question. People collectively was at cunstructed by the 1945 Constitution mandates the state to make policy (beleid) and the management actions (bestuursdaad), setting (regelendaad), management (beheersdaad), and control (toezichthoudensdaad) for the purpose of overall prosperity of the people. Administration functions (bestuursdaad) conducted by the state government with the authority to issue and revoke licenses facilities (verguning), license (licentie), and concessions (Consessie). Regulatory functions by the state (regelendaad) is done through the legislative authority of the Parliament and the government, and regulation by the Government. Management functions (beheersdaad) carried out through stock ownership (share-holding) and / or through direct involvement in the management of State-owned Enterprises or State Owned Legal Entity as an institutional instrument, through the state, cq Government, leverage its control over the resources to be used for the maximum prosperity of the people.

In an effort to find out about understanding the meaning of control by the state Oil and Gas Act, the approach used is to review and analyze the normative issue judicially determined to see the rule of law by analyzing the Law. 22 of 2001 on Oil and Gas. Then, all data were analyzed by descriptive analysis.

Based on the research findings, the answers obtained by the state's right to control the natural resources of oil and natural gas both philosophically and legally, as well as the position of the state in the business of oil and gas in the perspective of the Law of Oil and Gas after the decision of the Supreme Constitution. So in the need for a new law in the form of construction that can carry pengusaahan state control in the oil and natural gas in accordance with the mandate of Article 33 UUD 1945 to the maximum benefit of the people.

Keywords : State's Mining Right on oil & gas, Oil & Gas Mining Purpose, and oil & gas Mining Development under the law.

A. INTRODUCTION

It is in the interest of natural resource rich countries to use their resources to obtain funds for social and economic development. To do so, many governments enter into contracts with foreign companies to develop and sell their oil or gas. Negotiating the right contract is vital to a government's efforts to reap the benefits of its natural resources.

Oil from Aceh had probably been known from time immemorial, but the first reference to it in Europe dates from 954 AD[1]. The ancient Greeks, in particular Ptolemy, may also have known about Indonesia's oil. In the late 1500s some early Dutch explorers brought Indonesian crude oil back to Holland "where it was held in high esteem for treating rheumatism and sciatica". Thus it can be seen that the ownership and management of Indonesia's natural resources is not an historically recent phenomenon created by either colonialism or the industrial revolution and its ensuing demand for raw materials[2].

Dealing with foreign interests over natural resources has been a significant part of Indonesia's commercial history for a period of over three millennia, almost certainly longer than it has in the west. Interest in Indonesia's oil would have risen rapidly with the invention of the internal combustion engine and the motor, but even prior to that time Indonesian crude oil had provided kerosene for fueling household lamps in South East Asia over the last two centuries.

Against that rough background, let us now address our topic firstly by examining the general philosophical approaches to the ownership, exploration and exploitation of mineral resources, first generally and then, specifically, the Indonesian approach.

Different systems of law are applied by different countries to regulate their oil and gas production industries depending upon their natural resource philosophy and their basic Constitution. As a general rule, the systems of law governing minerals, including oil and gas, can be divided into three basic categories plus a

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[1] Van Bemmelen, R.W. 1970. "The Geology of Indonesia Vol II – Economic Geology", Second

[2] Mirza A. Karim and Karen Mills, 2003, "*Indonesian lehal framework in the oil, gas, energy and mining sectors, including dispute resolution.*Jakarta.p 3

combination of these three:

Firstly, a system known as “Regalia”, which historically meant rights belonging to the monarch, or today: the state. In this legal system, all minerals below the surface of the earth are owned by the state. In some countries, the state may, and does, give to private parties the right to explore and exploit such minerals. Such a system is applied in Australia, among other countries. With a few minor exceptions, in general Australia recognises the separation of the rights over the land from rights in the minerals below the surface.

Secondly, a system in which the ownership of the minerals below the surface is an integral part the ownership of the land above it. In such case, the owner of land also possesses the full right of ownership of the minerals lying beneath the surface of such land. This system is applied in the United States of America and in some parts of Australia. In such jurisdictions, any individual who owns land automatically becomes the owner of any minerals found thereunder.

Thirdly, a system in which the whole of the mineral resources below the surface of the land belongs to the people of the country and is not transferable nor assignable. Indonesia applies this system, whereby the state, as custodian for the Indonesian people, holds these rights in trust and administers the exploration and exploitation of these mineral rights. In this case exploration and exploitation may be directly carried out by the state or state enterprises, or by private parties based upon some nature of joint operating contract.

Fourthly, some countries apply a combination of these systems, or may allow their political subdivisions to determine which system is to be applied. In Australia, for example, although generally the system of *Regalia* is applied, in some states, such as Tasmania and Western Australia, the land owner is recognized as the owner of the minerals thereunder6, while in others, such as Victoria, exploitation of the minerals is permitted to be undertaken directly by the private sector.

Indonesia has a history and developments in the regulation of mining rights of oil and gas. History of the development of petroleum (oil and gas, hereinafter referred to as gas) in Indonesia has lasted over a hundred years, beginning in 1883 where for the first time the sultan Langkat oil mining concessions to Acilo

J.zijlker in the lake said, North Sumatra[3]. In 1885 the oil and gas industry in Indonesia officially began with the drilling of the first commercially producing oil from wells Telaga Said 1.

In accordance with the constitutional mandate that natural resource-related public needs to be mastered by the State for the greatest prosperity of the people, the State regulate the exploitation of oil and gas through the rule of law in the form of legislation. Through the dynamic development of the oil and gas industry, some products in the form of legal legislation has become law setting the historical record and the state control of oil and gas in Indonesia ranging from Law no. 44 Prp. About the 1960 Mining Oil and Gas (gazetted 1960 No. 133, Supplement to State Gazette No. 2070) during the rule of President Sukarno and became the first law governing the subject of oil and gas in place of *Indische Mijnwet* 1899, Law no. 15 In 1962 On Government Regulation of Law No. 2 In 1962 On determination Oil Company Liability to Meet the Needs of the Interior, and with the change of government from the President Soekarno. to the President Soeharto Forming laws establish Law. 8 of 1971 About Company of Oil and Gas State, and the rule above is used as the rule of law in the field of oil and natural gas until 2001. With the passing of reforms in various fields in 1999 and is accompanied by changes of government, and to form Law. 22 Year 2001 concerning Oil and Gas, hereinafter referred to in this paper as the Oil and Gas Act. Debate in the essence of some of the above legislation is the meaning of state control of the oil and natural gas that are mandated by Article 33 paragraph 2 of the Constitution of the Republic of Indonesia in 1945, hereinafter in this paper called the 1945 Constitution the phrase "State's Mining right"

Some things are a discourse on the articles contained in the oil and gas law, among other legal structure formed by oil and gas law in the form of institutional holders of rights to oil and gas mining (mining rights), the pattern of relationships in the business of oil and gas cooperation (mining economy), as well as the form of the development and maintenance of oil and gas exploitation Indonesia (mining

[3] Konsesi Sultan Langkat diberikan Kepada A.J Zijlker pada tanggal 8 Agustus 1883, dengan luas daerah Konsesi 500 bahu. Lihat juga Departemen Pertambangan dan Energi, ditjen Migas, *40 Tahun perkembangan Usaha Pertambangan Minyak dan Gas Bumi Indonesia 1945-1985*. (Jakarta: Ditjend Migas. 1985). hal. 13.

development) which is the third subject of the above boils down to control of the State for Petroleum and Natural Gas Rights or in the form of the Master By State Oil and Gas concession in Indonesia.

In the phrase "dominated by the state" does have a meaning that the State has full rights within the framework of sovereignty over their natural resources to control or manage limited only then produce, to the role and position of the State in the exploitation of petroleum and natural gas, as well as the intent of the rule by country by Act No. 22 of 2001 on Oil and Gas.

Position of the state in the Oil and Gas Concession in Indonesia, in the elucidation of the position of a point of view of the state as the owner of the natural resources of oil and gas coming from the communal rights of the people of Indonesia. The role and position of the state in the business of oil and gas limited set start or physical control to the delivery of production to all the people of Indonesia in the form of direct or in the form of profits or by rights of control by the state, the state has the right to own and manage both the mining right, mining economic, and mining development

B. PROBLEM

Oil and Gas Policy is a step the government for development purposes which the goal is to realize the ideals of the nation to build a just and prosperous society. However, this step is more oriented to the target (target oriented), but there is a more fundamental, namely related to "control" over oil and gas resources (energy) as a solid foundation before setting the policy measures that are more operationally to achieve that goal. Government seems to forget that the management of oil and gas law that is manifested in the Oil and Gas Act No. 22 Year 2001 which is no guarantee that Indonesia has sovereignty over natural resources in oil and gas to prove it three times a judicial petition to the Constitutional Court. With a solid foundation that Indonesia has sovereignty over natural resources, then new strategies can be developed to build self-sufficiency in oil and gas exploitation in order to be used for the welfare of the people.

According for some reason above, the problem in this points are:

1. How does the position of the state in the form of Oil and Gas Concession (Industrialized) in Indonesia?
2. What is the State Controlling of Mining Rights in Oil and Gas Concession based on Act. No. 22 of 2001?

C. RESEARCH METHOD

Research Approach

Writing research using normative juridical methods of reviewing and analyzing the management of oil and gas industry in Indonesia through a judicial review of the oil and gas law (Law no. 22 2001), Institutional governing body of oil and gas, Partnership Forms, and Policy-oil energy sources is the purpose of the right to control the state of the oil and gas resources as well as the sovereignty of the country. Writing normative juridical (legal normatief), here is intended that the legal issues that the object of the study was analyzed based on sources such as laws and regulations, legal theories, the opinions of legal experts in order to strengthen the argument the author in formulating alternative management model of the Oil and Gas industry in Indonesia.

Writing approach used in this study are first, approach legislation (statute approach)[4], which is the approach used in the writing of the law by reviewing legislation relevant to the legal issues in the field of Oil and Gas Management. Second, is a method of comparison (comparative approach) which compares the structure and management of oil and gas in some form prior arrangement. Third, is the concept approach (conceptual approach)[5] which offers a model right By State in the Oil and Gas industry in Indonesia for the maximum benefit of the people.

Law Material

[4] Peter Mahmud Marzuki, 2005, *Penelitian Hukum*, Jakarta: Kencana Prenada Media, hlm 93.

[5] Johny Ibrahim, 2006, *Teori dan Metode Penelitian Hukum Normatif*, Malang: Bayumedia hlm 313-315

There are several legal material as data for anayze the case :

1. Primary Law material

   Primary legal materials are data obtained from materials which have the force of law and binding and directly related to the problems written[6]. Primary legal materials in peneulisan scientific work consists of:

   a. UUD 1945 as Constitution of Republik Indonesia;
   b. Act No. 22 Year 2001 about Oil and Gas;
   c. Act No. 5 Year 1960 about Agraria;
   d. Verdict of Constitutional Court No. 002/PUU-I/2003;
   e. Verdict of Constitutional Court No. 020/PUU-V/2007;
   f. Verdict of Constitutional Court No. 036/PUU-X/2012;
   g. Government regulation No. 55 Year 2009 about Upstream effort in oil and gas Industry.
   h. President Regulation No. 95 Year 2012 about Change Position in work of Upstream function.
   i. President Regulation No. 09 Year 2012 about Upstream activity business in oil and gas mining.

2. Secondary Law Material

   Secondary legal materials in the writing of this paper include data as supporting information in the form of writing, which consists of:

   a. Doctrine of law;
   b. Books Theory of law;
   c. Journals;
   d. Consultation and Discussion
   e. Data from web page.

3. Third Law Material

   a. Legal dictionary;

[6] Amirudin, Zainal Asikin, 2003, *Pengantar Metode Penelitian Hukum*, Jakarta: PT RajaGrafindo Persada, hlm 47

b. Bahasa Indonesia dictionary;
c. English dictionary;

Method Collecting Law Material

Method collection of legal materials in the writing of this paper uses search techniques legal materials and documentation, with the collection of legal materials obtained from the library, search the literature, consultation with the supervisor and searches through the website on the internet.

Method Analyze Law Material

Legal materials analysis techniques in the writing of this paper uses descriptive analysis. Sources of legal materials obtained and analyzed in a way, first to describe or provide a description of objects based on analysis of the current study. They mean that the legal materials obtained regarding the object of study is the concept of management of oil and gas in Indonesa and its relation to the right to control by the state. Both do the interpretation of the phrase contained in the legislation under review article. Third comparing the results from the interpretation of these articles to article in other laws relating to look the problems that arise for later analysis on a few things such diperbandingakan order to obtain a result in the form of excess or weakness of the analysis contained therein. Fourth provide a conclusion and recommendation of the data that has been analyzed is based on the results or discussion that has been done.

D. ANALYSIS

Indonesia's Regulations during the Dutch Colonial Period

During the Dutch colonial period, which lasted for over 350 years until the declaration of Indonesia's independence on 17th August 1945, the colonial government reserved to itself all mining rights, oil and gas included. This policy was relaxed gradually, so that by the 1850's mining rights could be afforded to

private enterprises under an excecutive order[7].

Exploration for oil and gas has been conducted in Indonesia since 1869, commencing approximately 14 years after the drilling of the first oil well in the world - in Pennsylvania, U.S.A. The first well was drilled in Indonesia in 1871. In 1883, the first oil concession was granted in North Sumatera to Royal Dutch Shell. By the turn of the nineteenth century, oil was being produced in north and south Sumatera, central and east Java, and Kalimantan, with 18 companies exploring for oil. One of these companies was the Shell Transport and Trading Company, owned by an Englishman, Marcus Samuel. Originally the company traded in sea shells and spices, then moved into oil shipping and then into oil exploration and ultimately production. It merged with Royal Dutch Company in 1907. Becoming Royal Dutch Shell, one of the major players in today's petroleum sector.

In Dutch colonial times, the mining of minerals, including oil and gas production, was governed by the "Indische *Mijnwet"* of 1899, as amended in 1904 and further amended in 1918. This *Indische Mijnwet* provided, , that:

(i) The government granted concession rights to the private sector to explore and mine minerals and/or to produce oil;

(ii) The period of any such concession right would not exceed 75 years;

(iii) Holders of concession rights were required to pay land rent to the colonial government in accordance with prevailing regulations; and

(iv) Minerals produced from concession areas became the property of the concessionnaires. Concessionnaires were thus free to sell or export their product, without the necessity of obtaining further permission from the Government.

The amendment of 1904 provided that concession rights could only be granted to Dutch citizens, residents of the Netherlands East Indies or companies established under the laws of the Netherlands or of the Netherlands East Indies. This was introduced in an attempt to limit the number of new companies applying for exploration concessions, particularly gold tenements.8 At that time there had

[7] Muchtar Kusumaatmadja, 1974 "Mining Law", Padjajaran University, Bandung. P.2

been several stock market scams perpetrated in Holland over what were claimed to be enormous gold deposits in Sumatera: a precursor to the Bre-X scandal in Kalimantan almost a century later.

In 1912, Standard Oil of New Jersey, a major US-based oil company – one of the "Seven Sisters" - through its Dutch subsidiary, *Nederlandsche Koloniale Petroleum Mattschappij* ("NKPM"), obtained concessions in Jambi, South Sumatera and Bunyu, East Kalimantan. NKPM eventually became known as PT. Stanvac Indonesia. In the period from 1924 to 1940, the Jambi field produced over 60 million barrels of crude oil. A further amendment in 1918 opened the possibility for non-Dutch foreign interests to obtain concession rights, but only for a period of up to 40 years, rather than the 75 granted to Dutch or colonial entities. Such concessionnaires would then pay an excise duty to the colonial government of 4% of crude oil production and a 20% tax on oil profits and 20% tax on corporate profits.10 These were comparable to prevailing Middle East contracts.

Agreements made between the colonial government and foreign interests were based upon Article 5A of the *Indische Mijnwet,* and thus such agreements came to be known as "5A Contracts".

The Netherlands East Indies Government, having opened the door to the entry of foreign interests for oil exploration and production concessions, found that by 1924 over 119 such concessions had been granted.11 In view of this apparent attractiveness of the colonial administration's terms, in 1928 the government, as governments predictably do in these circumstances, amended the legislation to provide somewhat more favorable terms for the government, including:

- Reduced tenure to 40 years;
- Drilling obligations were imposed;
- Area relinquishments were introduced for areas of low exploration prospectiveness;
- State royalties were introduced;
- Progressive profit share was introduced, amounting to as much as 20% of net profits.

In 1930, another US major, Standard Oil Company of California ("SOCAL"), formed an Indonesian subsidiary, *NV Nederlandsche Pacific Petroleum*

Maatschappij ("NPPM"), which was granted the Rokan block in Riau, Central Sumatera. Later, in 1936, NPPM and The Texas Corporation formed a joint venture company known as The California Texas Oil company ("Caltex") , which has become one of Indonesia's major oil producers, discovering the Minas and Duri fields.

Apart from the oil industry, the colonial government controlled and operated a substantial part of the hard mineral mining industry. It controlled a large part of the tin mining industry, owned and operated coal mines and a gold/silver mine, and as well held a substantial share in *Netherlands Indische Aardolie Maatsschappij* ("NIAM"), an oil exploration joint venture between Shell and the colonial government. This concept of government participation in the hard minerals mining industry carries through to the present day, with state corporations such as PN. Aneka Tambang (now privatized and listed on international stock exchanges), PN. Tambang Timah and PN. Tambang Batu Bara1 owning and operating mines, as well as acting as partners with foreign mining companies.

By the start of World War II, Indonesia was the largest oil producer in Asia and was thus clearly an imperative strategic target for the Japanese invasion of South East Asia, to provide fuel to their armies of occupation and further invasion plans. Control of all mining activities in Indonesia were taken over by the Japanese Occupation Forces for a period of almost three and a half years. Many oil installations and mines throughout Indonesia were destroyed by the fleeing Dutch operators ahead of the Japanese invasion.

At the end of the war, the "Big Three" oil companies (Shell, Stanvac and Caltex) were keen to return to Indonesia and entered into agreements first with the Dutch and later with the newly-formed government of the Republic of Indonesia.

Regulations after Indonesia's Independence A. Transitional Period

Article 33 of the 1945 Constitution ("UUD 45"), states:

1) *The economy shall be organized as cooperative based on the concept of family;*
2) *Branches of production which are of importance to the State and which*

affect the majority of the people shall be controlled by the State;

3) *Earth, water and natural resources contained within the earth shall be under the control of the State and shall be used for the maximum welfare of the people."*

Although UUD 45 had been enacted a day before Independence was declared, the laws and regulations implementing UUD 45 with respect to oil and gas mining were not drafted and passed by legislation until 1960. Between the time of independence and the enactment of Law No. 44 of 1960 – The Oil and Gas Law ("UU 44/60"), exploration and production in the petroleum industry in Indonesia sank to their lowest levels, and were administered under the transitional regulations of UUD 45.

A similar, although longer, hiatus was experienced in the mineral exploration industry until the Provisional Mining Law, Law No 37 Prp13 of1960 ("UU 37 Prp/60") was completed into its final form, in 1967, and promulgated as the Basic Mining Law .

The concept of UU 44/60 and UU 37 Prp/60 was initiated in 1951 by a motion made by Teuku Mohammad Hassan, an Achenese member of the then DPR-S (Temporary *People's House of Representatives)*. He urged that the *Indische Mijnwet* be reviewed due to its incompatibility with the spirit of UUD 45. To some extent Hassan's motion reflected increased and understandable nationalism in the new republic and anti-foreign sentiments generated by what was viewed at the time as the privileged position of "The Big Three" in relation to exchange controls and other benefits. Hassan's motion was unanimously accepted by the DPR-S, but it effectively stalled further investment in the oil industry until UUD 44/60 was passed. It was in this period Dutch citizens were expelled from Indonesia and Shell was nationalized, which filled the international investment community with a considerable degree of caution in their sovereign risk analyses for Indonesia.

Implementation Period of UU 44/60 and UU 37 Prp/60

UU 44/60 was enacted on 26 October, 1960 under the title: "Oil and Gas Mining". This law reaffirmed the basic principle of the Indonesian state, as

mentioned in Article 33 of UUD 45, that all minerals, including petroleum, belong to the people of Indonesia and shall be controlled by the state and used for the optimum welfare of the people. UU 44/60 provides, *inter alia,,* that:

. All oil and gas found within the territory of Indonesia is national property and controlled by the state.
. Oil and gas mining shall only be carried out by the state and be implemented only by state enterprises.
. The Minister of Mines may appoint other parties as contractors of the state enterprise if necessary.
. Contracts of Work between the state enterprise and any contractor must be legalized by law.
. The authority to mine shall not include any surface land rights.
. Should any land rights, which are not a state right, overlap with area of any mining authority, the land owner will be compensated.

In the oil industry, the "Big Three" balked at these new provisions. They saw the old concession system scrapped in front of them with a re- affirmation of state rights over natural resources and an increased government share to 60%. The Indonesian Government requested them to comply as contractors to the state. Negotiations with the "Big Three" seemed deadlocked until the government negotiated a proto-Production Sharing Contract ("PSC") with a US-based company, Pan American Indonesia Oil, an international subsidiary, of Standard Oil of Indiana, in 1962. This proto-PSC contained all the elements of the new legislation, including cash bonuses, production bonuses and a 30 years' tenure. Finally, with this political coup in hand, an ultimatum was issued to the "Big "Big Three" (accept our terms or lose the concession). Seeing that the government government had recently been nationalising a number of foreign agricultural agricultural projects, the contractors conceded and on 1st June 1963, in Tokyo Tokyo each entered into in what became known as the Tokyo Agreement.

Salient points of that agreement included:

- Relinquishment of all rights granted under the former colonial government and acceptance to act as a contractor to one of the

three state oil companies.

- Twenty-year extensions were granted to existing production areas; with consent to apply for additional acreage with a 30 year tenure.
- Marketing and distribution to be surrendered to the state enterprises within five years, on an agreed price structure. As well, the contractors agreed to supply the state distribution organisation with products at cost-plus a fee of US 10 cents per barrel, for as long as required.
- Refineries would be surrendered to the state after a period of 10-15 years, according to an agreed price formula; subsequently the companies would be prepared to supply crude to state refineries at cost plus a fee of 20 US cents per barrel for as long as required.
- Operating profits would be split 60/40 between the state and the company respectively; and in any event the state would receive a minimum payment of 20 per cent of the gross value of produced crude in that year.

The other requirements of UU 44/60 obviously applied as well. Following the enactment of UU 44/60, on 25th September, 1963, three Contracts of Work ("CoW"s) were concluded between the then three existing state oil companies and foreign oil companies. These were between:

- PN. PERTAMINA and PT. CALTEX PACIFIC INDONESIA,
  CALASIATIC and TOPCO;
- PN. PERMINA and PT. SHELL INDONESIA; and
- PN. PERMIGAN and PT.STANVAC INDONESIA.

These CoWs, were legalized under Law No. 14 of 1963, each for the period of 20 years, and provided, that:

- The Contractor shall be responsible for the operational management of exploration and production of all oil and gas in the CoW area.
- The Contractor shall bear all financial risks as the result of operations.

- The period of tenure of the CoW shall be for 20 or 30 years.
- Ownership of Contractor's share of the petroleum products produced is transferred to Contractor only upon Point of Sale.
- The Contractor has the right of ownership of all equipment used in production or other operations relating to the petroleum products, through permitted depreciation. Once depreciated, all such equipment will belong to the state enterprise.
- The Contractor is obliged to relinquish acreage to the state enterprise, in accordance with an agreed-upon schedule.
- Revenues from sale of the produced oil and gas shall be shared: 60% for the state enterprise (including income tax) and 40% for the Contractor.
- The Contractor must allocate 25% of all production for the domestic market, if requested, at a price of US $ 0.20 per barrel.
- From this general format can be seen the seeds of the terms of the eventual Production Sharing Contract ("PSC")15 which, in its final form, has since its inception satisfactorily governed the oil and gas industry in Indonesia up to today.

The Era of PERTAMINA

In 1968, the three state corporations16 previously responsible for the oil and gas industry were rationalized and merged into one: PN PERTAMINA, under a government regulation establishing the state oil and gas corporation. On 15 September, 1971, Law No. 8 of 1971 ("UU No. 8/71", also often referred to as the "PERTAMINA Law") was enacted, regarding the State Oil and Gas Mining Company (PN. PERTAMINA), serving as the legal basis for the incorporation of the current day Perusahaan Pertambangan Minyak dan Gas Bumi Negara ("PERTAMINA"). Here, for the first time the Production Sharing Contract ("PSC") is mentioned in Indonesian legislation.

Unlike CoWs, PSCs entered into between PERTAMINA and its contractors (generally foreign oil companies) were no longer required to be approved by the Indonesian Parliament, as had the former Contracts of Work After the enactment of UU No. 8/71, PERTAMINA entered into a large number of PSCs with foreign oil companies on a regular basis.17 Since that time, no further CoWs were entered into by PERTAMINA.

New Oil and Gas Legislation (Law No. 22 of 2001)

For some time now, it has been widely recognised that Indonesia's oil and gas industry was in need of a major overhaul with regard to general corporate efficiency, particularly in relation to regional autonomy – the devolution of power from Jakarta to the provinces and increased sharing of revenues derived from natural resources. Partially driving this desire for reform was an obvious comparison to be made between PERTAMINA's performance and that of its Malaysian counterpart, Petronas. Petronas, originally created as a copy of PERTAMINA, has been in existence for only half the life of PERTAMINA but has proven a far more efficient corporation, producing 33 per cent of Malaysia's oil and gas output compared with the 7.2 per cent of Indonesia's produced by PERTAMINA[8].

After predictable opposition from both PERTAMINA and the provinces, on 23 November, 2001, the new Oil and Gas Law, Law No. 20 of 2001 ("UU No 20/2001") was finally passed, revoking previous legislation (UU 44/60 and UU 8/71) and transferring total authority over oil and gas activities from PERTAMINA back to the government.

UU 20/2001 divides exploration and production of oil and gas into "upstream" and "downstream" activities. Upstream activities cover exploration and production, while downstream covers post-production activities such as refining, transport, storage, sales and trading.

[8] Newbery, Mark; 'New Indonesian Oil and Gas Law' in the International Bar Association Journal of Energy & Natural Resources, Vol 20, No 4, 2002, at p.356.

Upstream activities are to be implemented and controlled through Cooperation Contracts with oil companies which shall be notified to the DPR (the Peoples' House of Representatives) and supervised pro-tem by a new regulatory body, BP-MIGAS. Downstream activities are to be carried out based upon business licenses granted to Indonesian legal entities, and are to be supervised by a separate regulatory body as yet to be formed.

Each business entity, be it an Indonesian company or a foreign entity, may obtain rights over and operate in only a single contract area. This restriction is known as "ring-fencing" and remains unchanged from the prior legislative regime. The consequence is that costs and losses from one unproductive area cannot be offset against profits from a successful area for tax purposes. The period of a Cooperation Contract shall not exceed 30 years, with a possibility to extend for up to a further 20 years. The exploration period is 6 years and is included in the 30 years tenure period. The exploration period may be extended once but not for a period greater than 4 years. UU 20/2001 also states that if the appointed contract operator fails to commence exploration activities within five years, the entire contract area will be forfeit and returned to the Minister of Mines.

UU 20/2001 also sets out the obligation of the Contractor to allocate the optimum of 25% of all petroleum production, including gas, for the domestic market. All exploration data gained through general survey, exploration and production activities shall belong to the state and be controlled by the government.

State Mining Rights in Natural Resources in the Oil and Gas Law. 22 year 2001.

State tenure in Article 33 of the Constitution of 1945, confirming the country to seek natural resources pertaining to public utilities and public sevices. On the basis of philosophical considerations (the spirit is the basis of economic and familial joint venture), strategic (kepnetingan general), politics (to prevent monopolies and oligopolies that harm the country's economy), economic (efficiency and effectiveness), and for the general welfare and overall prosperity people.

Based on the above formulas turned out to contain some of the same elements. From understanding the various equations, the formulation of the terms of tenure means the country through the government have the authority to determine the use, utilization and natural resource rights within the scope set up, administer, manage, and oversee the management and utilization of natural resources.

Therefore the natural resources that are important to the state and serving the people, as it relates to the public good (public utilities) and public services (public services), should be controlled by the state and run by the government. Because of natural resources, should be enjoyed by the people in a fair, affordability, in an atmosphere of prosperity and the general welfare and equitable.

Article 33 UUD 1945, became the basis for the exploitation of natural resources in Indonesia. Context "Mastering Rights State" became the basis for the state has full authority for resource management in Indonesia. Oil and gas as an important branch of production to the State and public needs, including natural resources controlled by the state. State control over oil and gas re-affirmed in Article 4 of Law No. 22 of 2001, the oil and gas is a natural resource strategic nonrenewable contained within the Indonesian mining laws are national assets controlled by the state.

Furthermore, Article 2 and 3 to set the control by the state, was organized by the government as the holder of mining rights by establishing the Executive Agency for Oil and mining Specifically Earth stipulated in Law No. 22 of 2001. Article 1 of Law No. 22 Year 2001 on Oil and Gas define petroleum is the result of natural processes such as hydrocarbon in atmospheric pressure and temperature conditions in the form of liquid or solid phase, including asphalt, wax and bitumen mineral or ozokerit obtained from the mining process , but does not include coal or other hydrocarbons precipitated solid derived from activities that are not related to the business activities of oil and gas.

Natural gas according to Article 1 of Law No. 22 Year 2001 on Oil and Gas is the result of natural processes such as hydrocarbon in atmospheric pressure and temperature conditions in the form of gas phase obtained from the Oil and Gas mining. Implementation activities Oil and Gas under the provisions of Law No.

22 of 2001 section 2, based on the economy, alignment, benefit, justice, equity, equality, prosperity and welfare of the people, security, safety and legal certainty as well as environmentally .

Provisions of Law No. 22 of 2001 Article 4 paragraph (1) states that the Oil and Gas is a natural resource strategic nonrenewable contained within the Indonesian mining laws are national assets controlled by the state. Article 2 of the regulation specifies that state control as referred to in paragraph 1 held by the government as the holder of mining rights. Furthermore, the provisions of paragraph 2 states that the government as the holder of mining rights form the implementing agency

E. CONCLUSION

Control by the state in Article 33 UUD 1945 has a sense of a higher or wider than the concept of ownership in civil law. Conception control by the state is a conception of public law relating to the principle of popular sovereignty adopted in the 1945 Constitution, both in politics (political democracy) and economic (economic democracy). In the notion of popular sovereignty, it is the people who are recognized as a source, the owner, and also the highest authority in the life of the state, according to the doctrine "of the people, by the people and for the people". In terms of the highest power is also included public sense of ownership by the people collectively. That the earth and the water and the natural resources contained within state jurisdiction is essentially public property of all the people people collectively mandated by the state to master in order to be used for overall overall prosperity together. Therefore, Article 33 paragraph (3) determine the the "earth and water and the natural riches contained therein shall be controlled by controlled by the state and used for the benefit of the people.

Forms of state position in the Oil and Gas Concession under the Act. No. 22 Year 2001 on Oil and Gas Earth, besides acting as the holder of mining concessions (KP) government has also served as a coach, as a regulator and as a supervisor of business activities Migas. Article 38 of Act No. 22 Year 2001,

confirm that the guidance on oil and gas operations conducted by the Government.

F. RECOMMENDATION FOR FURTHER STUDIES

The Government and Parliament should immediately form a new oil and gas law in accordance with the conditions of the existing legal dynamics, post-tested 3 times in the Constitutional Law. 22 of 2001 has undergone a few chapters inskonstitusional decision to become an urgency to become legal in the national oil and gas exploitation.

The establishment of the rule of law on oil and gas exploitation on Earth expect more substance embed philosophical, and juridical of Article 33 UUD 1945 in favor of the welfare of the people to the greatest prosperity of the people and by looking back control of the state construction rights to the oil and natural gas nationwide .

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